Supreme Court of the United States.

OCTOBER TERM, 1880.

Nos. 89 and 129.

THE BUFFALO AND JAMESTOWN RAILROAD COMPANY, PLAINTIFF IN ERROR,

vs.

PATRICK FALCONER AND OTHERS.

THE BUFFALO AND JAMESTOWN RAILROAD COMPANY, PLAINTIFF IN ERROR,

vs.

WALTER J. WEEKS AND OTHERS.

ERROR TO THE SUPREME COURT OF THE STATE OF NEW YORK.

BRIEF FOR PLAINTIFF IN ERROR.

R. T. MERRICK,
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BASS, CLEVELAND & BESSELL,
For Plaintiff in Error.

JUDD & DETWEILER,

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ERROR TO THE SUPREME COURT OF THE STATE OF NEW YORK.

Brief for Plaintiff in Error.

I.

STATEMENT OF CASE.

Certain legislative enactments of the State of New York, passed in the years 1869, 1870, and 1871, and which will be found printed in the Appendix to this Brief, authorized

municipal corporations to aid in the construction of railroads in that State. The proceedings were prescribed by which a majority of the tax-payers of any such corporation were authorized to bind it, in the exercise of the power so granted. These proceedings were originated by the presentation to the county judge of a petition duly verified, asking for the issue of a specific amount of the bonds of the corporation to be invested in the stock or bonds of the railroad company proposed to be aided. The judge, if satisfied, after proper evidence adduced before him, that a majority of the tax-payers desired the proposed subsidy, and that all the requirements of the statutes had been fully complied with, appointed commissioners to issue the bonds and make the subscription to the stock or bonds of the railroad company, *with or without conditions*, as the original petition may have indicated.

Acting under these laws, a majority of the tax-payers of the town of Ellicott, a municipal corporation in the county of Chautauqua, in the State of New York, petitioned the county judge of that county to take proceedings to authorize the issue of bonds of the town to the amount of $200,000, and the investment of the same or of the proceeds thereof in the stock of the "Buffalo and Jamestown Railroad Company," a railroad corporation in that State, and the plaintiff in these cases, *upon the conditions that the line of the railroad of said company to be constructed from the city of Buffalo to the line of the State of Pennsylvania, in said county, shall be located and constructed through the village of Jamestown, in said town of Ellicott, before said bonds shall be delivered to said company or sold.* (Record No. 129, p. 5.)

After proceedings in due form according to law, the county judge directed the bonds to be issued and invested, as prayed in the petition; and he appointed Weeks, Breed and Jones, defendants in No. 129, as commissioners to issue and invest the bonds. (Record No. 129, p. 6.)

The Buffalo and Jamestown Railroad Company, which was sought to be aided, was a corporation duly organized under the general incorporation laws of the State of New York, by a certificate filed in the office of the Secretary of State of New York, of which a copy will be found printed in the Appendix to this Brief, for the purpose of constructing a railroad from the city of Buffalo, in said State, to the Pennsylvania State line, in the county of Chautauqua. (Record No. 129, p. 5.) Its charter did not locate the road through the village of Jamestown, and did not require its construction to be through or near that village. To induce such location and construction through Jamestown, the action of the tax-payers of Ellicott was taken, which has just been mentioned.

Thereupon, on the 14th day of June, 1872, the above-mentioned commissioners of the town of Ellicott, Weeks, Breed and Jones, entered into a contract in writing, (Rec. No. 129, p. 7,) with the railroad company, in which it was agreed and stipulated, that when the railroad company should "have located and constructed through the village of Jamestown, in the town of Ellicott, the proposed railroad of said company, running from the city of Buffalo to the Pennsylvania State line, in the said county of Chautauqua," the commissioners would thereupon subscribe for $200,000 of the capital stock of the company and deliver the bonds of the town to an equal amount in payment therefor; and, in consideration of this undertaking, the railroad company bound itself to receive the subscription of the town, and to deliver to it the stock of the company so subscribed for, and to accept in payment the bonds of the said town.

Subsequently, on or about the 26th of August, 1874, the bonds were executed and placed by the commissioners in the hands of A. F. Allen and Robert Newland, as trustees, to deliver the same to the company in payment of two

hundred thousand dollars of its capital stock, *if the company should, on or before the first day of January*, 1876, *have constructed its railroad to and through the village of Jamestown, in in said town of Ellicott.* If the road was not so constructed, the bonds were to be returned to the commissioners. (Record No. 129, pp. 8, 9.)

Allen died, and Newland remained sole trustee, and as such was made defendant with the commissioners in this suit.

Thereupon, in pursuance of this agreement, the company located its road by proper surveys, to and through the village of Jamestown, and began the construction of the road so located *before the first of January*, 1875. The road was completed through the village, in full accordance with the terms of the contract, on or before the 20th day of October, 1875. The company then offered to receive the subscription of the town, proposed to deliver the amount of its capital stock agreed to be subscribed for, and demanded the bonds of the town in payment according to the terms of the contract.

The commissioners declined to subscribe to the stock of the company, or to authorize the delivery of the bonds, *solely on the ground* that, under an amendment to the State constitution, which went into effect on January 1, 1875, the power was taken away from municipal corporations, which they had possessed under previous laws, of purchasing or owning the stock of incorporated companies. Newland, under the instructions of the commissioners, declined to deliver the bonds. (Record No. 129, p. 10.)

A copy of the amendment to the State constitution, upon which the commissioners based their refusal, will be found in the Appendix to this Brief.

Certain tax-payers of the town thereupon filed a bill in equity to restrain the commissioners from delivering the bonds. This is the suit now numbered 89 on the calendar

of the present term of this Court. The railroad company also instituted suit against the commissioners and Newland to compel performance of the contract. This is the suit now numbered 129 on the present calendar of this Court. It was begun by what is known as a *case* under the statute of New York.

The first suit was heard upon demurrer; the second upon a case stated. Both were argued together, and treated substantially as the same case in the State courts; and the same opinion was delivered in both. Both the supreme court and the court of appeals of the State of New York decided against the right of the railroad company, and held that there was *no contract in existence* which the town was obliged to perform at the time the amendment to the State constitution, of which mention has been made, went into effect, viz., the first of January, 1875. (See Opinion of Court of Appeals, 69 New York Rep., p. 491.)

The writ of error now sued out is based upon the ground that the constitutional amendment adopted by the State, which went into effect on January 1, 1875, was in contravention of the Federal Constitution, so far as this contract between the town of Ellicott and the Buffalo and Jamestown Railroad Company was concerned, and operated to impair the obligations of that contract; and that the decision of the State court denied to the plaintiff in error the protection given to contracts by section *ten*, article *one*, of the Constitution of the United States.

II.

ASSIGNMENT OF ERRORS.

1. The court of appeals of the State erred in holding that, on the first day of January, 1875, there was no valid contract between the town and the railroad company, which could have been affected by the constitutional amendment.

2. The court erred in holding that the commissioners of the town could not by any agreement bind the town until the condition imposed by the tax-payers' petition was fully complied with.

3. The court erred in holding that full compliance by the railroad company with the condition imposed by the tax-payers' petition, that the proposed road should be located and constructed through the town of Jamestown, was a condition precedent to the making of any agreement whatever by the commissioners.

4. The court erred in holding that, until full compliance by the company with the foregoing condition, the commissioners had no authority whatever to act in any manner.

5. The court erred in its construction of the State acts of 1870 and 1871, in holding that where such a condition was imposed, the commissioners had no authority under the act of 1870 to make any agreement until such condition was complied with.

6. The court erred in holding that, on the first day of January, 1875, the railroad company had acquired no right to the bonds.

7. The court erred in holding that the constitutional amendment of January 1, 1875, prohibited the town of Ellicott from issuing or delivering the bonds in question.

8. The court erred in holding that the constitutional amendment of January 1, 1875, was retroactive in its character.

9. The court erred in decreeing against the rights of the plaintiff in error.

III.

BRIEF OF ARGUMENT.

A.

THE QUESTION OF JURISDICTION.

This Court has already decided that there is a Federal question involved in this case.

At the October Term of 1877, a motion was made to dismiss the appeal for want of jurisdiction. Under the authority of the case of The Jefferson Branch Bank *vs.* Skelly, (1 Black, 443,) and numerous other decisions, the court decided that there was a Federal question involved, and that it had jurisdiction of the case.

As the point may be mooted again at the present hearing, and has an important bearing on the merits of the controversy, we may be excused for referring, as briefly as possible to the points made on the former occasion.

1.

It has been held by this Court, "that it is not necessary "that the question (the Federal question) should appear on "the record to have been raised and the decision made in "direct and positive terms *ipsissimis verbis;* but it will be "sufficient if it appears by clear and necessary intendment "that the question must have been raised and must have "been decided in order to have induced the judgment."

Crowell *vs.* Randall, 10 Peters, 368.

Armstrong *vs.* Treasurer, 16 Peters, 281.

And again: "Where there are several questions in the "record, some of local and some of Federal jurisdiction,

" and the judgment or decree is silent as to the ground " upon which it is rendered, the jurisdiction will be sus- " tained, if the defenses on the local questions afford no " answer to the suit. In other words, the Court will not " presume that the court below decided these local defenses " erroneously, in order to defeat jurisdiction."

Maguire *vs.* Tyler, 8 Wallace, 652.
Gibson *vs.* Chouteau, 8 Wallace, 317.
Railroad Company *vs.* Maryland, 20 Wallace, 643.

That is, in such cases, this Court will review all the defenses, both local and Federal, in order to ascertain the sufficiency of the former, and whether the decision upon them has not been made for the mere purpose of evading the latter.

Formerly it was the rule that the opinion of the State court could not be resorted to for the purpose of showing that a question of Federal cognizance was decided by that court.

Rector *vs.* Ashly, 6 Wallace, 142.
Williams *vs.* Norris, 12 Wheaton, 117.
Gibson *vs.* Chouteau, 8 Wallace, 317.

But since the passage of the act of Congress of February 5, 1867, which has been substituted for the 25th section of the Judiciary act of September 24, 1789, it is understood that this Court may always look into the opinion of the State court to ascertain what precise point was decided, and whether the Court did necessarily pass upon the Federal question raised in the case.

Murdock *vs.* Memphis, 20 Wallace, 590.
McManus *vs.* O'Sullivan, 91 U. S., 578.
Railroad Co. *vs.* Maryland, 20 Wallace, 643.

In the last mentioned case, that of the Railroad Company *vs.* Maryland, this Court said:

"Some of the decisions of this Court under the act of 1789 would undoubtedly justify the view taken by the counsel of the defendant in error, in support of the motion to dismiss, if it were clear that the second proposition on which the court of appeals placed its judgment was sufficient to control the case, and that it involved no consideration of Federal law. But the act of 1789 contained restrictive language not in the act of 1867; and in construing the statute as it now stands, we have ruled in the case of Murdock *vs.* Memphis, just decided, (20 Wallace, 590,) that where the Federal question has been raised, and has been decided against the plaintiff in error, the jurisdiction has attached, and it must be heard on the merits. * * * * The counsel of both parties in this Court are entitled to be heard when the record shows the existence of a decision which gives us jurisdiction, on the soundness of that decision, on its sufficiency to control the judgment in the whole case, and on the sufficiency of any other point decided to affirm the judgment even if the Federal question was erroneously decided."

Railroad Co. *vs.* Maryland, 20 Wallace, 643.

The same position is maintained in the case of The Home Insurance Company *vs.* City Council of Augusta, (3 Otto, 120;) Bolling *vs.* Lessner, (1 Otto, 594;) and Brown *vs.* Atwell, (2 Otto, 327.)

So that, since the act of 1867, it is no longer a matter of doubt, that in all such cases the jurisdiction of this Court will be sustained, if it appears that a Federal question was in fact decided, or that its decision was necessarily involved in the judgment or decree as rendered, even though other questions may have been involved, and the case may have been actually decided upon other questions.

2.

What is the Federal question involved in this case?

It is urged that all that the State court has done in the present instance is to construe the effect of the laws of the State upon the power given to municipal corporations to enter into a certain class of contracts; and that the State court has not passed at all upon the validity of the constitutional amendment, but has merely decided that, under the laws of the State, the municipal corporation exceeded its powers in making the contract in question, and that there was in fact no valid contract upon which the constitutional amendment could operate.

It is unquestionably the general rule, that the construction given by the State courts to State legislation, and to State constitutions, will be held as conclusive and binding upon this Court, when shown by a line of uniform and harmonious decisions. But this rule has always been held to have this one exception, that, where the Federal constitution is invoked to protect an alleged contract against adverse State legislation, this Court will always decide for itself, regardless of the State courts, whether a contract actually exists or not.

This precise point was decided in the case of The Jefferson Branch Bank *vs.* Skelly (1 Black, 443;) and the rule, as there laid down, has never been departed from by this Court. That case is so very similar to the present, that we are induced to cite from it the portion bearing upon this question:

"We answer to this, as this Court has repeatedly said, whenever an occasion has arisen for its expression, that its rule of interpretation has invariably been, that the constructions given by the courts of the States to State legislation and to State constitutions, have been conclusive upon this Court, *with a single exception;* and that is when it has

been called upon to interpret the contracts of States, though they have been made in the forms of law, or by the instrumentality of a State's authorized functionaries, in conformity with State legislation. It has never been denied, nor is it now, that the Supreme Court of the United States has an appellate power to revise the judgment of a supreme court of a State, whenever such a court shall adjudge that not to be a contract which has been alleged, in the forms of legal proceedings, by a litigant, to be one, within the meaning of that clause of the Constitution of the United States which inhibits the States from passing any law impairing the obligation of contracts. Of what use would the appellate power be to the litigant who feels himself aggrieved by some particular State legislation, if this Court could not decide, independently of all adjudication by the supreme court of a State, whether or not the phraseology of the instrument in controversy was expressive of a contract, and within the protection of the Constitution of the United States, and that its obligation should be enforced, notwithstanding a contrary conclusion by the Supreme Court of a State? It never was intended, and can never be sustained by any course of reasoning, that this Court should, or could with fidelity to the Constitution of the United States, follow the construction of the supreme court of a State in such a matter, when it entertained a different opinion; and in forming its judgment in such a case, it makes no difference in the obligation of this Court in reversing the judgment of the supreme court of a State upon such a contract, whether it be one claimed to be such under the form of State legislation, or has been made by a covenant or agreement by the agents of a State, by its authority.

"We have thus given, very much in what has been the language of this Court, what has always been its attitude in respect to the revisal of the judgments of the supreme court of a State upon contracts which have been declared not to be within the protection of the Constitution of the United States."

Jefferson Branch Bank *vs.* Skelly, 1 Black, 436.

To the same effect precisely are the following cases re-

ferred to by the Court in its opinion in the last-mentioned case:

Piqua Branch Bank *vs.* Knoop, 16 Howard, 369.
New Jersey *vs.* Wilson, 7 Cranch, 164.
Dodge *vs.* Woolsey, 18 Howard, 331.
Ohio Life Ins. Co. *vs.* Debolt, 16 Howard, 432.
Mechanics' Bank *vs.* Debolt, 18 Howard, 380.
Charles River Bridge *vs.* Warren Bridge, 11 Peters, 420.

Language more forcible, or more applicable to the present case, could not have been used, than that found in the opinion of the Court in the case of The Jefferson Branch Bank *vs.* Skelly.

It is not to be supposed that a State court, any more than a Federal tribunal, would directly give effect to a State enactment in contravention of that Federal Constitution which is the supreme law for both. In no case whatever has a State court attempted to uphold a State enactment in derogation of a prior *admitted* contract, for the protection of which the Federal Constitution has been invoked. In all cases the decision has been, *not that the State legislation should be supported notwithstanding that it impaired the previous contract, but that no valid contract existed to be impaired*; and that no rights had vested or obligations been created to be protected by the Federal Constitution. If the Supreme Court were bound to follow such a construction, no case could ever come before this tribunal under the claims of the Federal Constitution prohibiting legislation in derogation of contracts previously made. Any rational construction of this clause must of itself lead to the same conclusion. The question can never arise except in some particular case, and upon some particular contract which is claimed to be impaired by subsequent legislation. The Federal

question, therefore, necessarily implies an examination by this tribunal, not only into the *effect* of the State legislation, but also into *the character of that which is alleged to be affected* by such legislation. Before this Court can be called on to decide whether a State statute is one impairing the obligation of any particular contract, it must necessarily decide for itself first whether there is, in fact, any such contract in the case to be impaired.

Accordingly, we find that in every one of the cases in this Court in which the jurisdiction has been sustained on the ground of a denial by the State court of operative effect to that clause of the Federal Constitution which protects contracts, the alleged contracts involved have been uniformly held by the State court to be invalid, on account of a pretended or presumed disability in some of the parties to make such contracts, or else it has been maintained that what was claimed to be a contract was no contract at all.

In the case of the Jefferson Branch Bank *vs.* Skelly, the contract set up was an alleged immunity from ordinary taxation arising under the act of the State legislature incorporating the bank, and the acceptance of the act and the performance of its conditions by the bank. It was claimed that an assessment of the property of the bank for taxation, in pursuance of a subsequent law of the State, was in violation of a provision of the act of incorporation of the bank, whereby a certain portion of the profits of the bank were to be paid to the State, and such payment was to be in lieu of all taxes upon the bank or its stock. The supreme court of the State of Ohio (9 Ohio State Rep., 606,) affirming a previous decision of the same court in the case of Sandusky Bank *vs.* Wilbur, (7 Ohio State Rep., 481,) held that there was *no contract*, but merely a privilege or immunity that might be resumed at pleasure by the State; or even if there was an apparent contract, it was void, because unauthorized and *ultra vires*, on the ground that the State could not per-

manently renounce its right of taxation, and that no legislature could bind a subsequent legislature by any such enactment. And this was held under the constitution of the State of Ohio.

Instead of following the decision of the State court in its construction of the constitution of the State, and of the effects of the limitation of that constitution upon legislative action, this court denied its conclusiveness, repudiated the decision, and held that, in all such cases, it would decide for itself the existence or the non-existence of the power to contract; and that it would, therefore, in this regard, construe the State constitution and the State law, and ascertain for itself whether a power to contract was or was not vested in the party assuming to make the contract. In opposition to the State court, it held that there was a Federal question in the case; that the power to contract existed; that there was, in fact, a valid contract between the bank and the State; that this contract was impaired by the subsequent State enactment; that, as to it, such subsequent enactment was null and void; and that it would not follow the decision of the State court in any such case.

In the case of New Jersey *vs.* Wilson, (7 Cranch, 164,) it appeared that the State of New Jersey, in consideration of the surrender to it of certain titles by some Indian tribes, had assigned certain lands to these Indians, and provided by statute that these lands should be free from taxation. Subsequently, the lands were sold by the Indians, and the State passed an act for their taxation in the hands of the purchasers. The supreme court of New Jersey, upon a case brought before it, held that no contract had been entered into between the Indians and the State, and that there was nothing in the transaction upon which the Federal guarantee could operate. This court held the contrary opinion, and adjudged that the subsequent State legislation was unconstitutional, null and void, and accordingly reversed the judgment of the State court.

All the cases hold the same doctrine throughout—that, wherever a contract was alleged and the protection of the Federal Constitution was invoked in its favor against alleged hostile action by the State, this Court will not accept the decision of any State court as conclusive upon it in reference to the scope of legislative action, but will inquire and and decide for itself upon the subject.

The present case does not differ in principle from these repeated adjudications.

Neither does it make any difference that the contract in the present case was made by a town, or its commissioners, and not by the State itself directly. Whether the town or its commissioners, be regarded as, for the time being, vested with the delegated authority of the State, and exercising legislative power, or whether they are considered merely as acting in their corporate capacity, the result is the same. The fundamental question in either case is that of *contract or no contract*, and this court has said that it will decide this question for itself.

The fundamental question in this case, is, therefore—was there a valid contract entered into between the parties, to be protected by the Federal constitution?

B.

The court of appeals of the State of New York has rested its decision entirely upon the alleged want of power in the commissioners to execute the contract in controversy. It held that they could make no agreement of any kind to bind the town, until the road of the company was located and constructed through the village of Jamestown.

When it is remembered that the object of the contract, and of the tax payers in taking proceedings under the act of 1869, was to secure the location and construction of the road through the village of Jamestown, when a different

route might have been selected; and that the railroad company, acting upon the faith of the contract, did actually locate and construct its road in accordance with the agreement, no presumption can well be entertained, either in favor of the town, which, now having received the desired beuefit, seeks to repudiate the obligation which procured it, or in favor of the justice and equity of a decision which aids and abets them.

But it must be said on behalf of the municipal organization that it offers no opposition to the execution of the agreement. Neither do its authorized agents, the commissioners appointed by the county judge on the petition of the tax-payers, representing, according to the judgment rendered, a majority of the taxable property of the town. *Five* only of the inhabitants of the town, being also tax-payers, appear in this proceeding to interpose objection, and the commissioners, admitting the obligation of the contract, decline to act further in the premises, "*solely* on the ground that under the provisions of the amendment to the constitution of the State of New York" they "are not authorized to subscribe to the stock of said railroad company,"—and submit to the court the question of the extent of their power as affected by the amendment, in order that they may not incur the danger of transcending its limits.

Record 129, page 10.

There is not the slightest imputation of bad faith on the part of the company, nor a pretence that any expectation even of benefit to be derived from the agreement has been disappointed; but on the contrary, it is admitted that the railroad was "fully completed through the village of Jamestown" "in full compliance with the *terms and requirements of the contract*," and that it is now in successful operation.

Record 129, page 9.

In order to determine the question of the power of the

commissioners to execute the contract in question, it is necessary, in the first place, to examine in detail the laws of the State of New York in relation to the bonding of municipalities to aid in the construction of railroads. These laws will be found in the Appendix to this Brief.

The first of the series, in order of time, is the act of May 18, 1869.

Act of May 18, 1869, Chapter 907.

By this act municipal corporations are authorized, under certain limitations and restrictions, to issue their bonds and invest the same, or, the proceeds thereof in railroad stock or bonds.

The first section of the act prescribes, as conditions precedent to the execution of the power conferred, that whenever a majority of the tax-payers whose names appear upon the last preceding assessment roll of the corporation as owning a majority of the taxable property of the corporation, shall make application to the county judge, by petition setting forth that they are a majority of the tax-payers and represent a majority of the taxable property of the corporation, and that they "desire that such municipal corporation shall create and issue its bonds" to a certain specified amount, and invest the same or the proceeds thereof in the stock or bonds of some designated railroad company in the State of New York, it shall be the duty of said county judge to give notice, by publication for a specified period, that he will, on a day certain, proceed to take proof of the facts set forth in the petition "as to the number of tax-payers joining in such petition and as to the amount of taxable property represented by them."

The second section of the act then prescribes, that the judge shall, on the day specified in the notice, proceed to take proof as to the allegations in the petition, and that if,

on hearing the proof, he shall be satisfied that the petitioners do represent a majority of the tax-payers and also a majority of the taxable property of the corporation, he shall so adjudge, and cause the same to be entered of record, and that such "judgment and the record thereof shall have the same force and effect as other judgments and records in courts of record in the State."

Section third provides, that upon the rendition of judgment by the county judge in favor of the truth of the allegations of the petition, it shall be his duty "forthwith to appoint and commission" three persons, whose qualifications, compensation and period of service are specified in the act, and whose duties and powers are defined, by sections *four and five*, as follows:

They are required, "with all *reasonable dispatch* to cause to be made and executed the bonds of the municipal corporation," to affix thereto the seal of the corporation and sign and certify the same. They are "empowered and directed to subscribe, in the name of the corporation, to the stock or bonds," as the petition may designate, of the railroad company named in the petition, "to an amount equal to the amount of the bonds so created by them, and to pay for the same by exchanging the said bonds therefor at par, or they *may at their discretion* sell or dispose of the said municipal corporation's bonds, so created by them, at rates not less than par, and invest the proceeds thereof in stock or bonds." They are to represent the municipal corporation at all meetings of the bondholders or stockholders, and vote for directors on the stock taken by them.

The next act in order of time is that of April 28, 1870.

Act of April 28, 1870, Chapter 507.

The title of this act discloses its purpose to be "to define the powers of commissioners appointed under chapter 907

of the laws of 1869, bonding municipalities to aid the construction of railroads." The act is as follows:

"SECTION 1. It shall be competent for any corporation, in aid to whose railroad bonds shall have been authorized to be issued by any municipal corporation in this State, to enter into any agreement with the commissioners appointed to issue said bonds, limiting and defining the times when, and the proportions in which, said bonds or their proceeds shall be delivered to said corporations, and the place or places where, and the purpose for which, such bonds or their proceeds shall be applied or used, and any such agreement in writing, duly executed by said corporation and the majority of such commissioners, shall, in all courts and places, be valid and effectual. And such commissioners shall not be compelled by any court to deliver such bonds or their proceeds to such corporations until such agreement shall be excecuted, if required by them.

"SECTION 2. This act shall take effect immediately."

The third and last act of the series is the act of May 12, 1871.

ACT OF MAY 12, 1871.

This act, by its title, purports to be an amendment to each of the two preceding acts. Some of the amendments are important, and all such as have any bearing on the questions now before the Court are as follows:

1. Section *first* of the act of 1869 is amended by the following provision:

"The petition authorized by this section may be absolute or conditional; and, if the same be conditional, the acceptance of a subscription founded on such petition shall bind the railroad company accepting the same to the observance of the condition or conditions specified in such petition: *Provided, however*, That non-compliance with any condition inserted in such petition shall not in any manner invalidate the bonds created and issued in pursuance of such petition."

2. Section *second* of the act of 1869 is amended by the following provision:

"The judge shall file the petition as part of the judgment roll, and on making his final determination in any case, he shall forthwith publish notice thereof for three weeks, at least once in each week, in the same newspaper in which notice of such hearing was published as ordered."

3. By section *six*, the *fourth* section of the act of 1869 is amended by providing that "the said commissioners may issue the said bonds payable at any time they may elect, less than thirty years, any law heretofore passed to the contrary, but they shall not so issue said bonds so that more than ten per cent. of the principal amount of said bonds issued shall become due and payable in any one year."

Chapter 507 of the acts of 1870 is amended by the following addition to the end of the first section thereof:

"But in case such commissioners and such railroad corporation cannot agree, or in case the said commissioners refuse to make any agreement, then in either case, the Supreme Court at general term, may, on motion, and after hearing all parties interested, determine upon what terms and conditions such bonds shall be delivered to said railroad corporation, having due regard to the public good, the rights of said municipal corporation whose bonds are authorized to be issued, and the rights of said railroad corporation."

It was under the authority of these acts of the Legislature of New York that the transaction, brought in question in the present case, took place.

It is apparent that the commissioners derived their power directly from the acts themselves, as well as from the petition of the tax-payers, which, by the direction of the act of 1871, became *a part of the judgment roll* made up by the county judge.

Under these acts the power of the town to subscribe for stock, and issue its bonds was not to be exercised through the ordinary governmental departments and officers of the municipality, but by different agencies especially provided for that particular purpose, and which were respectively clothed with certain well-defined powers, and upon which were, respectively, devolved certain specified duties.

The county judge was to enter a judgment and make the petition of the tax-payers a part of the judgment roll. He was, at the same time, to appoint three commissioners "for the purpose hereinafter named,"—to use the words of the act of 1869— whose powers and duties are prescribed and defined by this and other several acts before referred to.

The judgment entered by the county judge was a record of the determination of the municipality to issue its bonds, and of the purpose of such issue, and a formal declaration of the general terms of a contract for the purchase of stock to be made between the municipality and the corporation named in the petition.

The transaction having reached this condition, the functions of the county judge ended and those of the commissioners commenced.

They were to carry out the purpose declared by the tax-payers in the petition, under the authority vested in them by the acts of the legislature, and in the way, and by the means those acts prescribed. It is apparent in reading the acts that in the execution of the power conferred, many things were left to the discretion of the commissioners.

It is not claimed that the commissioners could do anything in contravention of the terms and conditions specified in the petition and judgment, but the proposition is, that in carrying into effect those terms and conditions, and in accomplishing the purpose of the tax-payers as recorded in the judgment, the commissioners derived their power, and obtained their instructions, directly from the laws of the State.

The legality of the proceeding, up to the date of the execution, by the commissioners, of the contract of June 14th, 1872, may be taken as conceded. It is not controverted in the opinion of the court of appeals of New York, and any question in regard to it will be considered hereafter. If these proceedings were regular up to the time indicated, it follows that the legislative grant of power to the municipality to issue its bonds, and purchase the stock of the railroad company, through the commissioners appointed, was full, complete, and valid.

Railroad Company *vs.* County of Otoe, 16 Wall., 673.

The question then recurs, did the power of the commissioners authorize them to make the contract of June 14th, 1870?

The petition of the tax-payers declares as follows:

"Your petitioners desire that the said town of Ellicott shall create and issue its bonds to the amount of $200,000, and invest the same or the proceeds thereof in the stock of the Buffalo and Jamestown Railroad Company, upon the conditions that the line of railroad of said company to be constructed from the city of Buffalo to the line of the State of Pennsylvania, in said county, shall be located and constructed through the village of Jamestown, in said town of Ellicott, before said bonds shall be delivered to said company or sold."

No explanation could make the purpose the tax-payers intended to accomplish, and the danger they intended to guard against, plainer than the terms in which they expressed themselves.

Their main purpose was to get the railroad company to extend its line through the village of Jamestown. This was the end to be accomplished. As a consideration to the corporation for giving to Jamestown the benefit and advantage

of railroad communication, the tax-payers of the town of Ellicott, in which Jamestown is located, proposed that they would take $200,000 of the stock of the company. But the experience of other localities in similar transactions caused them to apprehend, that if the stock was *paid for before* the actual construction of the road through Jamestown they might suffer a loss of their securities without receiving any corresponding benefit. They, therefore, very wisely determined, that as the consideration for their bonds was to be not only the stock of the company, but also the construction of its track through Jamestown, the purchase price of the stock should not be paid *until the entire consideration* was assured to the municipality. But the tax-payers naturally desired that their proposal should have all the force and effect that could be given to it, and, consequently, intended that the railroad company should be stimulated to build the line along the route proposed for its adoption, by having the assurance of a legal obligation, that when it was built along that route the municipality would pay for the stock. So long as the commissioners in no way committed the municipality to issue its bonds and pay for the stock *before* the road was actually completed through the village, whatever they did by assurance or contract, to satisfy the company that it would be paid for upon the happening of that event, was wisely and well done and entirely within their power. Their office was to get the road built through Jamestown if it could be done on the terms proposed, and their duty, in executing the power with which they were clothed, was to make those particular terms as effective as possible to bring about the contemplated result. The petition nowhere forbids them to subscribe to the stock of the company *until* the conditions on which it was to be paid for should have been performed; nor does it anywhere deny them the authority to make an executory contract, though it limits them as to the terms of such a contract; neither does it require them

to remain inactive in the premises until the road should have been built through the village; on the contrary, the power to carry out the wishes of the tax-payers vested in the commissioners *eo instanti* their appointment, and the only limitation upon the exercise of the power followed the general grant of authority by a distinct direction that, in its exercise, *payment* should not be made *until* the work requested to be done should have been actually finished. The act of 1869, *section four*, imperatively directed the commissioners, "with all *reasonable dispatch*, to cause to be made and executed the bonds" of the municipality, and under *section six* of the amendatory act of 1871 they were to make said bonds "*payable at any time*" *in their discretion* "less than thirty years," though "not more than 10 per cent. of the principal to become due and payable in any one year." In none of these particulars did the petition make any provision. They were left for settlement to the discretion of the commissioners, and to contract between the commissioners and the railroad corporation.

By section *first* of the act of 1870 the privilege of having an executory contract, in the premises, was accorded *as a right* to the railroad company, and the commissioners were specially empowered "to enter into any agreement, limiting and defining the times when, and the proportions in which, said bonds or their proceeds should be delivered to said corporation, and the place or places where, and the purposes for which, said bonds or their proceeds should be used;" and it is declared that "any such agreement in writing, duly executed by the commissioners and the corporation, shall, in all courts and places, be valid and effectual."

So important did the Legislature of the State regard the rights of the respective parties to have mutually binding executory agreements, duly made in such cases, that, in order to prevent any failure to obtain such an agreement,

it provided, by *section six* of the act of 1871 amending the act of 1870, that "in case such commissioners and such corporations cannot agree, or in case such commissioners *refuse to make* any *agreement*, then, in either case, the Supreme Court at general term may, on motion, and after hearing all parties interested, determine upon what terms and conditions said bonds shall be delivered to said railroad corporation, having due regard to the public good, the rights of said municipal corporation whose bonds are authorized to be issued, *and the rights of the railroad corporation.*"

The court of appeals of New York takes the ground, in its opinion, that, since the passage of the act of 1871, providing that the petition of the taxpayers may be "absolute or conditional," the act of 1870 is practically repealed as to all cases in which the petition is "conditional." That is the only ground upon which the court denies to the act of 1870, operative effect upon the power of the commissioners. This mode of repealing State legislation certainly has the merit of novelty. The *fact* that this same act of 1871 providing that the petition may be "conditional," *also gives a mandatory direction* that, in case the commissioners refuse to make any agreement with the railroad company, the court shall make one for them, seems to have escaped the notice of the learned judges.

To reason that because the petition contains a certain specified condition, therefore the act of 1870 has no application to the case, is strangely illogical for so learned a tribunal as the court of last resort of the State of New York. It would seem much more in consonance with the ordinary process and rules of reasoning, upon such subjects, to hold that the general power conferred by the act of 1870 remains in force and effect *in all cases*, but restrained in its exercise by the conditions specified in the petition, so that no valid contract could be made, the terms of which are not in harmony with those conditions. Such

a conclusion, as to the relative operation of the petition and the legislative enactment, as sources of power to the commissioners, would impair the efficacy of neither, and assure the harmony and usefulness of their united action in advancing the main purpose of the tax-payers.

It becomes yet more difficult to understand the force given by the court to the act of 1871, as repealing the act of 1870, in cases where the petition might be conditional, when it is observed that before the passage of that act the tax-payers possessed full authority to make a petition conditional as well as absolute *under the act of* 1869. The power of the tax-payers to make a petition, setting forth that they "desire that the municipal corporation should issue its bonds" to a certain amount, and invest the same in the stock of a railroad company, necessarily includes the power to specify the terms and conditions upon which such bonds shall be paid out, and such investment shall be made.

The court says that, "after the passage of the act of 1871, the importance of the act of 1870, was nothing in cases of 'conditional petitions.'" This declaration apparently concedes that the act of 1870, was in full force and effect up to the passage of the act of 1871, and would have operated on commissioners appointed in pursuance of a conditional petition presented under the act of 1869, though it could not be allowed to operate on commissioners appointed in pursuance of a conditional petition presented under the act of 1871. There seems to be some obscurity about this reasoning of the court.

The court, pursuing the argument upon this point, and *assuming* that under the petition in this case the commissioners possessed no authority to subscribe for stock before the condition had been complied with by the company, says: "On the other hand, the petition of the taxpayers having been adjudicated upon by the county judge and the commissioners of the town appointed by him with power to

issue and deliver the bonds upon the fulfilment of the condition precedent by the railroad company, the latter needed no farther agreement or obligation; and hence the form of taking one was of no legal or practical consequence, and availed not to strengthen any existing right, nor to create a new one."

It may be true that the railroad company "needed no farther agreement or obligation," *if, as indicated, there was a legal obligation* already on the commissioners, by reason of the force of the judgment, to deliver the bonds on the performance of the condition precedent, specified in the petition. All the company would have to do under the circumstances stated by the court, and in view of the legal operation ascribed to those circumstances, would be to *accept the proposal*, and there would, thereby, be immediately created a valid and binding executory contract imposing obligations beyond the power of the State to impair. This the railroad company actually did, by the contract of the 4th of June, 1872, supplemented by the trust declared by Allen and Newland on the 26th of August, 1874, for said corporation, *and further, by actually entering upon the execution of the work before the amendment to the State constitution went into operation.* Applying to the transaction the rule laid down by this Court in Nugent *vs.* The Supervisors of Putnam County, 19 Wall., 241, and the County of Moultrie *vs.* The Savings Bank, 92 U. S., 635, as to what constitutes a subscription to stock, the company, by such an acceptance, apart from any force and effect claimed for the terms of the written contract, became bound, under section 1, of the act of 1871, "to the observance of the condition or conditions specified in the petition."

According to the view indicated by the court of appeals, when applied to the facts of the case, an executory contract was, therefore, created, independent of any power, in that regard, possessed by the commissioners.

This may be, and probably is, a complete solution of the case; but we are now dealing with the powers of the commissioners and the contract made by them.

EXECUTION OF POWERS AND RULES OF CONSTRUCTION.

In applying principles of construction to legislative acts, and especially to such as belong to the class we are now considering, it must be done with reference to the subject-matter contemplated by the legislature, as a whole, so as not to allow a manifest purpose and design to be defeated by denying the use of means by which the main object in view can be best accomplished.

The same rule applies to any other instruments conferring powers. The court must take a practical view of the entire subject, consider the interest of the several parties to the transaction, the circumstances surrounding them, and steadily regard, as a paramount consideration, *the main and leading purpose designed to be accomplished*, in order to determine correctly the question of the legality of the methods adopted to effect it.

Noonan *vs.* Bradly, 9 Wall., 408.
Reed *vs.* Ins. Co., 95 U. S., 30.
Oates *vs.* National Bank, 100 U. S., 144.
County of Scotland *vs.* Thomas, 74 U. S., 691.

The fundamental error of the court of appeals of New York was in considering the condition specified in the petition as a condition precedent to the existence of the power given to the commissioners, instead of treating it as a condition precedent to the exercise of that *part of the power* which authorized the delivery of the bonds in payment for the stock *only on completion of the work.*

The existence of a power is one thing, and its exercise is another.

A power which is not to arise until a future or contingent event happens, or until a condition is fulfilled, cannot be exercised until the event happens or the condition is fulfilled, for until then it has no existence.

Farwell on Powers, page 120.

"But a power *presently* given to a designated person to be exercised upon a contingency can be exercised before the contingency happens."

Farwell on Powers, page 118.
1st Sugden on Powers, * page 332.
Sutherland *vs.* Northmere, Dickens, R., 26.
Wondesforde *vs.* Carrick, Jr. R., 5 Eq., 486–495.

In the case of *Sutherland* vs. *Northmere* a power was reserved to Lady Travell to charge certain premises "*in case of the death of her husband in her lifetime.*" The donee of the power exercised it by deed, in due form, in the lifetime of her husband, creating a term in Northmere contingent upon the death of her husband in her lifetime. When the case came on to be heard, the court of chancery directed a case to be made for the judges of the court of King's bench, and the question to be: whether the deed made in the lifetime of the husband was a good execution of the power? The court decided that the power was well executed.

In the case of *Wondesforde* vs. *Carrick*, the vice-chancellor says: "The principle which has been established both in this court and at law as to the execution of powers upon a contingency, relieves the case from difficulty. That principle is, that when a power is given to a designated person to be executed upon a contingency, it may be executed before the happening of the contingency, and the execution of it will be valid upon the subsequent happening of the event."

The only question of any difficulty in this case would seem to be, as to which of the two distinct classes of powers that under consideration belongs.

First. Is it a power not to arise except on the performance of a condition?

Second. Is it a power already called into existence but the execution of which is limited and made dependent on a condition?

Third. If it is an existing power, the exercise of which is dependent on a condition, is the performance of this condition a necessary prerequisite to the *full* exercise of the power or only to the exercise of the power in certain specified particulars of the general transaction, as in the case of *The County of Moultrie* vs. *Savings Bank*, 92 U. S.?

The application to the statutes of New York and to the tax-payers' petition of the rules of construction laid down by this court, and those above referred to would seem to relieve the inquiry of all embarrassment.

In Noonan *vs.* Bradley, this Court said, that "when an instrument is susceptible of two constructions, the one working injustice and the other consistent with the rights of the case, that one shall be favored which standeth with the right."

CASES OF

The Town of Concord *vs.* The Savings Bank.

The Town of Moultrie *vs.* The Savings Bank.

The court of appeals of New York seems to have failed to appreciate the distinction between the case of the *Town of Concord* and that of the *County of Moultrie*, 92 U. S., and,

dismissing the latter with the curt statement, that it is not parallel, relies on the former for some of the most important grounds of its decision.

The case of the Town of Concord rested upon a claim to receive an alleged donation.

There is a wide difference between a *gift* and a *payment*—between a promise to bestow a gratuity and an undertaking to pay a consideration.

A special power to give excludes all idea of a power to contract. "A gift is voluntary and without consideration; whereas a contract is defined to be an agreement upon sufficient consideration to do or not to do a particular thing," (2 *Kent Com.*, 438.) No executory obligations, under such a power, can ever be created, and the parties can only change their legal relation to each other and to the subject of the gift by its actual delivery. A gift is, therefore, necessarily one transaction in contemplation of law, commenced and finished by the act of *giving*. Whatever may have been said and done by either party in regard to the transaction, up to that time, can create in neither a legal right, nor impose on either a binding obligation. Until the final consummation of the transaction by delivery of the thing to be given, the purpose to give, however solemnly declared, is subject to revocation, in the discretion of the donor, no matter what the other party may have done to place himself in position to receive the gift, (*Dyer*, 490; *McKinstry* vs. *Solomons*, 2 *John.*, 56.) The power being *only* to give, and not to contract, the doing by a party of anything deemed, or declared, necessary to be done, in order to place himself in a position to receive, would be regarded as merely a voluntary act, and not as an act done in pursuance of an obligation, and, therefore, vesting a right to be paid a consideration.

A party acting in his own behalf and having authority to give or to contract as he pleases, may, though intending to

give, inconsiderately, become subject to the obligations of a contract; but such can never be the case where the power to act at all depends exclusively upon legislative grant, and where the statute, making the grant, specifically limits the power to a power to give.

An act of the Legislature of Illinois, of March 7, 1867, empowered the town of Concord to appropriate such sum of money as it might deem proper to the Chicago, Danville & Vincennes Railroad Company to aid in the construction of the road, and to be paid to such company as soon as its road should have been constructed through the town, provided the proposition to appropriate money to said company should receive the majority of the votes cast at an election to be held for the purpose of submitting the said proposition to the people of that town. Pursuant to notice, an election was held on the 20th of November, 1869, at which a majority of the voters of the town voted to levy a tax to the amount of $25,000, to be *donated* to the said railroad company, provided, said company ran the said railroad through the village of Concord.

On the 20th of June, 1870, the railroad company filed, in the town clerk's office, a written notice of an acceptance of the donation.

On the 2d day of July, 1870, the new constitution of the State of Illinois came into operation, ordaining that no county, city, town, or other municipality should "make donation to" any railroad corporation. The donation not having been actually made and consummated before the 2d day of July, 1870, the question before the court was, as to the power of the municipality to make it after that time.

In considering the extent and nature of the power granted to the municipality by the act of the Legislature of March 7, 1867, Mr. Justice Strong, delivering the opinion of the Court, says:

"The authority given to the town of Concord by the statute was not to subscribe to the stock of the railroad company, but to make an appropriation or donation in aid of the construction of the road; and even that donation was not permitted to be made until after the location and construction of the road through the town. (P. 628.)

And in commenting on the transaction and the power of the municipality, he says:

"The town voted on the 20th day of November, 1869, that it would make a donation, *provided* the company would run its railroad through the town. On the 20th of June, 1870, the company gave notice of its acceptance of the donation. But the town was not empowered to make the donation until the railroad was located and constructed through the town. It had no authority to make a contract to give."

In the sentence last quoted is the "very *pith and marrow*" of the case.

The municipality derived whatever power it possessed from legislative grant. Without an act of the Legislature conferring special authority for that purpose the municipality could neither *give* to a railroad company the money raised by taxing its inhabitants nor use it for the purpose of purchasing railroad stock. Such transactions are not within the scope of the general powers of a public corporation, and can only be lawfully engaged in by such a body under special permission from the Legislature. It was for a long time doubted whether the Legislature could constitutionally confer such powers upon municipal and public corporations, and the decisions of the courts of last resort of the several States are not in perfect accord on the question, but it has been finally settled for this court by the opinion in the case of *The Railroad Company* vs. *The County of Otoe*, 16 Wall., 673. The Legislature may, in its discretion, confer upon a municipality the power to "give" in aid of a railroad, or it may confer the power to purchase rail-

road stock. But the two powers, as has already been shown, are quite distinct from each other, being composed of different constituent elements, and involving in their exercise very different consequences. A power to "give" can no more be construed to mean a power to *contract*, than a power to *contract* can be construed to mean a power to *give*. The power to give is a power under which no legal and binding obligation can be created as "preparatory" to the act of *giving*, whilst a power to contract includes among its constituent elements authority to create obligations "preparatory to an actual" execution of the specific contract authorized to be made. As the town of Concord did not possess the power to *contract* under the act of the Legislature, any proposals made by it to the railroad corporation relating to the gift it was empowered to make, would have to be construed and understood as within the limits of the authority ~~of the Legislature~~ conferred, and could not therefore become the initiation or foundation of a *contract*, no matter what the company might say or do in consequence of such proposals. The court, therefore says of the notice of acceptance filed in the county clerk's office on the 20th of June, 1870: "What is called an acceptance of the railroad company cannot be construed as an engagement to locate and build the road through the town. It amounted to no more than saying, 'If we build our road through your town we will accept your gift.'"

In the case now before the Court the acts of the Legislature of New York gave to the town of Ellicott a power to contract for the purchase of the stock or bonds of any railroad company in the State, wherever its line might be located or constructed, and to make the purchase of such stock or bonds upon such conditions as might be desired by the taxpayers and determined upon by the commissioners; and as distinctly showing the legislative intent in cases where the petition might be "conditional," the act of 1871 expressly provides that an acceptance of the subscrip-

tion shall, in such cases, *bind the company to the observance of the conditions specified in the petition.*

It follows that the acceptance of a *proposal* to subscribe on the conditions contained in the petition, devolves upon the company a similar obligation.

Such a power as this cannot be measured or defined, nor its exercise limited, by the rules applicable to a power to bestow a gratuity.

The power given to the county of Moultrie was a power to contract for the purchase of railroad stock, and the language of that section of the act which confers the authority is substantially identical with that used in the petition of the taxpayers in this case. The section referred to is as follows:

"The board of supervisors of Moultrie county are hereby authorized to subscribe to the capital stock of said company to an amount not exceeding $80,000, and to issue the bonds of the county therefor, bearing interest at a rate not exceeding ten per cent. per annum, said bonds to be issued in such denominations and to mature at such time as the board of supervisors may determine: *Provided*, That the same shall not be issued until the said road shall be opened for traffic between the city of Decatur and the town of Sullivan."

In construing this act, Mr. Justice Strong, delivering the opinion of the Court, says:

"It is not to be doubted that this section gave to the county complete authority to make a subscription to the capital stock of the company. The power was fettered by no conditions or limitations except as to the amount which might be subscribed, but the payment of the subscription was directed to be postponed until the railroad should be opened. And, of course, as a greater power includes every constituent part of it, the legislative act empowered the board of supervisors to agree to subscribe preparatory to an actual subscription."

The only question of difficulty in the case seems to have been as to the fact of execution of the power, and whether the circumstances set out in the record constituted a valid subscription to the stock of the company. The Court held that the subscription, "in substance and in legal effect," had been made, and then adds: "And if this conclusion could not be reached it would make but little difference in the present case, for it cannot be doubted that the action of the board was at least an undertaking to subscribe, and this was accepted or assented to by the company. * * * * In every aspect of the case, therefore, there was an authorized contract existing between the county and the railroad company when the new constitution came into operation."

The only difference between the act of the Legislature of Illinois and the petition of the taxpayers of the town of Ellicott, in so far as they define and limit the power they respectively confer, is in the form of the phraseology, and not in the substance of its meaning.

The former authorized a subscription to the stock of a certain railroad company to a specified amount, and directed that the bonds of the county should be issued therefor.

The latter authorized the making and issuing of the bonds of the county to a specified amount, and directed that they should be invested in the stock of a certain railroad company.

If the power to "subscribe" necessarily involves the power "to agree to subscribe preparatory to an actual subscription," as this court has said it did, the power to "invest" necessarily involves a similar power to agree to invest preparatory to an actual investment.

In each the limitation imposed was that the bonds should not be issued *until* the road should have been constructed to a certain designated point. This limitation was introduced in the act as a *proviso* and in the petition as a *condition*, the

former using the language most appropriate in a *statute*, and the latter adopting a mode of expression most appropriate in a *contract*. But the proviso and the condition perform a similar office in each case, and apply in each to a certain specified and corresponding part of the general transaction, viz., *the delivery of the bonds.*

The act of the Legislature and the petition of the tax-payers contemplated a precisely similar purpose, and each purposed to accomplish it in precisely the same way; and it is also apparent that the Legislature, in the one case, and the tax-payers, in the other, apprehended a precisely similar danger, viz., a possible failure to get the road constructed on the line desired, if the securities were delivered before the work was actually done, and that they adopted precisely similar means to protect the respective municipalities against such a disaster.

It is therefore submitted:

First. That the judgment entered by the county judge on the petition of the tax-payers was a proposal to contract made to the plaintiff in error by the town of Ellicott, which being duly accepted by the railroad company became a binding executory agreement for the sale of a certain amount of its capital stock, and vested the right to receive in payment therefor the bonds of the town upon the performance of the condition precedent set out in the petition.

"The authorized body of a municipal corporation may bind it by an ordinance, which, in favor of private persons interested therein, may, if so intended, operate as a contract."

County of Moultrie *vs.* Savings Bank, 92 U. S., 634.

Second. That the commissioners appointed by the county judge to carry out the purpose of the taxpayers, as declared in their petition, were, by said judgment, and by the several

acts of the Legislature of New York, clothed with power to make an executory contract, upon the terms and conditions specified in said petition; and that, in the proper exercise of this power, the commissioners did make the agreement of June 14th, 1872.

Third. That an executory contract between the town of Ellicott and the plaintiff in error, made by competent authority and mutually binding upon the respective parties thereto, being in existence at the time the amendment to the constitution of New York came into force, that amendment cannot operate to impair its obligation.

C.

There remains one further inquiry, and that is, supposing that the Federal question has been erroneously decided, as we think we have shown, is there any other point in the case involving no consideration of Federal law which would be sufficient to control the case and to support the judgment of the State court?

Two such points are suggested: 1st. That the county judge, in the appointment of commissioners, proceeded without authority, because sufficient jurisdictional facts were not alleged in the petition of the taxpayers. 2d. That *mandamus*, and not a *case* under the statute, was the proper mode of determining the controversy.

1.

The first answer to this is, that both these points have been disposed of by the State court, and held insufficient.

The supreme court of the State, in its decision rendered by Smith, Justice, (Record No. 129, pp. 14, 15,) which was affirmed by the court of appeals, and in which the case of

The People *ex rel.* Rogers *vs.* Spencer, (55 New York, p. 1,) cited in this connection, was reviewed, very distinctly held that that case did not apply; that the town and commissioners were estopped from denying the validity of the proceedings of the county judge, under which they had acted; and that this point, therefore, was insufficient to maintain any judgment in favor of the town.

It is not to be presumed, that this Court will maintain the sufficiency under State law of that which the State court itself in this very case declared to be insufficient, whether the decision of the State court on that point was right or wrong.

2.

In the second place, the point that *mandamus*, an not *case*, was the proper remedy, has also been disposed of by the State court, not in express terms, but by necessary implication. For the point is one that goes to the jurisdiction, and the State courts, both the supreme court and the court of appeals, did entertain jurisdiction, and did actually decide the case on its merits. This court will scarcely presume, as a ground for maintaining the sufficiency of the judgment of a State court on a matter of State law, that the State court had no jurisdiction, when, in point of fact, the State court had taken jurisdiction.

3

Upon the principle laid down in the case of The Jefferson Branch Bank *vs.* Skelly (1 Black, 443,) already cited, this Court will not be governed by the decisions of a State court in its construction of any alleged contract for which the protection of the Federal Constitution is invoked against alleged hostile State legislation; and especially will it not

be governed by decisions rendered subsequently to the making of the contract.

Now, the competency of the parties to make the contract in question, is just as essential an element of it as is any one of its express provisions. And if this Court will examine for itself whether the commissioners of the town of Ellicott were competent to make the contract in controversy, it will examine all questions entering into the validity of their appointments, regardless of any decision of the State court on the subject.

Regardless, therefore, of the case of The People *ex rel.* Rogers *vs.* Spencer, (55 New York, p. 1,) which was not decided until November 11, 1873, or about seventeen months after the contract in this case was made, this Court will decide for itself whether the commissioners of the town of Ellicott were legally appointed, and whether the county judge had power to render the judgment which he did render.

Only one defect is suggested; that is, that, in the petition of the tax-payers, the allegation is omitted, that the railroad company sought to be aided was a railroad company *in the State;* though the company was mentioned by name, and was in fact a company incorporated under the laws of the State of New York to build a road exclusively within the limits of that State.

To this objection there are several answers:

First. The town and its commissioners, according to the decision of the supreme court of the State, already cited, in this very case, are estopped from setting up this objection. That decision is good enough law for this point.

Secondly. The court of appeals, in the case in 55 New York, intimates very strongly that its decision would have been different if the case were not one in which the pro-

ceedings before the county judge were directly for review upon *certiorari*, or if the rights of third parties had intervened, as they have actually intervened in the present case.

Thirdly. It is provided in the statute of New York, already cited, and which will be found in the Appendix to this Brief, (Acts of 92d session of Legislative Assembly of New York, chap. 907, sec. 2,) that the "judgment (of the "county judge,) and the record thereof shall have the same "force and effect as other judgments and records in courts "of record in this State," and by sec. 29, act of May 12th, 1871, that the petition of the tax-payers shall be filed by "the judge as part of the judgment roll." Such being the case, that judgment carries with it that presumption of jurisdiction to which the judgments of courts of general jurisdiction are entitled under the common law. Now the judgments of a court of general jurisdiction are binding until reversed on writ of error or appeal, though no jurisdiction be shown on the record.

McCormick *vs.* Sullivant, 10 Wheaton, 192.
Ex parte Tobias Watkins, 3 Peters, 193.
Thompson *vs.* Whitman, 18 Wallace, 457.
Voorhees *vs.* Bank of United States, 10 Peters, 449.
Bank of United States *vs.* Moss, 6 Howard, 31.
Cooper *vs.* Reynolds, 10 Wallace, 308.

The presumption is, that, though jurisdiction may not appear on the record, it may have been shown by proof in the case. Want of jurisdiction may be shown affirmatively, notwithstanding recitals on the record to the contrary, by facts outside of the record. And so jurisdiction will be presumed until the contrary is made to appear affirmatively.

See Galpin *vs.* Page, 18 Wallace, 350.

The judgment of the county judge, therefore, cannot be impeached collaterally in the present proceeding.

Fourthly. The allegation that the railroad company sought to be aided was a railroad company *in the State*, does not seem, upon any fair construction of the statute, to be necessary as that of a jurisdictional fact. It is now universally understood to be the law, that, when a domestic corporation is named in pleading, it is necessary neither to allege nor to prove the fact of incorporation, unless such fact is specifically put in issue; but that, in respect to foreign corporations, the rule is different. When a corporation is named, the presumption is, that it is a domestic corporation, and that it has an existence in the State.

D.

We submit, in conclusion, that the decision of the Supreme Court and of the Court of Appeals of New York is erroneous, and should be reversed; that the Buffalo and Jamestown Railroad Company is entitled to the bonds agreed to be delivered to it; and that judgment should have been entered in its favor in both cases.

R. T. MERRICK,
M. F. MORRIS,
BASS, CLEVELAND & BESSELL,
For Plaintiff in Error.

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Dissenting opinion of Mr. Justice Gilbert.
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APPENDIX.

Dissenting Opinion of Mr. Justice Gilbert.

The commissioners were authorized to subscribe in behalf of the town of Ellicott for two hundred thousand dollars of the stock of the railroad company, and to pay for the same by issuing the bonds of said town whenever that company should have performed the condition upon which the authority to make such subscription was granted, namely, "that the line of the railroad should be located and constructed through the village of Jamestown, in said town of Ellicott." (Laws 1869, chap. 907; laws 1871, chap. 925.)

The commissioners made no formal subscription to the stock of the railroad company, but on the fourteenth of June, 1872, a written contract was entered into between the commissioners and the company, whereby the commissioners agreed that when the railroad company should have performed the condition aforesaid, they, as such commissioners, or their successors in office, would thereupon immediately subscribe, in the name of the said town of Ellicott, to the capital stock of said company, to the amount of two hundred thousand dollars, and pay for the same by delivering the bonds of said town in the same amount; and the railroad company agreed to receive said subscription and to receive said bonds in payment thereof.

The company did not perform the condition aforesaid until October, 1875; meantime and on the first of January, 1875, the amendment to article 8 of the constitution of this State, prohibiting any town from becoming, directly or indirectly, the owner of stock in any association or corporation, went into operation. (Const., art. 8, sec. 11.)

The said railroad company seeks a performance of the contract of June 14, 1872; but the commissioners insist that their power to perform it has been taken away by this amendment of the constitution.

By section 5 of the act of 1869, chap. 907, the commissioners were not only expressly empowered, but directed to

subscribe for the stock, and to exchange the bonds of the town therefor at par, upon the condition stated.

By chap. 507 of the laws of 1870, the railroad company was empowered to enter into an agreement with the commissioners appointed to issue said bonds, limiting and defining the times when and the proportions in which said bonds, or their proceeds, should be applied or used; and the act declared that any such agreement in writing, duly executed by such corporation and a majority of said commissioners, should in all courts and places be valid and effectual. It is argued on the part of the commissioners that said act did not confer upon them power to enter into an agreement, because the act limited their authority to issue bonds to a company in aid of whose railroad bonds had been authorized to be issued; and that the plaintiff was not such company, for the reason that, at the date of the agreement, the condition on which the authority to issue the bonds depended had not been performed.

Putting this objection in plain English, it is, that the conditional authority is no authority.

I think such a construction is obviously erroneous.

The language of the statute of 1870 justifies no discrimination between an authority granted upon condition or an unconditional one. All it requires is, that the railroad company shall be one in aid of the construction of whose railroad proceedings had been taken with authorized bonds to be issued at any time.

Before the act of 1870 referred to was passed, the only authority on this subject was contained in the aforesaid act of 1869, which authorized the commissioners to subscribe for the stock and issue the bonds simultaneously.

That statute did not in terms authorize a condition to be imposed upon the power or duty of the commissioners to issue the bonds. But in 1871 the legislature amended the act of 1869, by providing that the petition of the tax-payers, which is the foundation of the authority to issue the bonds, might be absolute or conditional, and binding the railroad company, in case of its acceptance of a subscription founded upon a conditional petition, to the observance of the condition therein specified. (Laws 1871, chap. 925, sec. 1.)

I can find no limitation of the authority of the commis-

sioners whereby they are required to withhold the issuing of the bonds until after the condition shall have been performed, and none has been pointed out. The only effect of making the petition conditional appears to be to impose a liability on the railroad company in case of an acceptance of the subscription. The authority of the commissioners to make the subscription and to issue the bonds, remains as it existed under the act of 1869, qualified only by the power of making the agreement respecting the issue of the bonds conferred by the act of 1870.

In other words, taking the statutes together, the meaning of them is, that the commissioners may withhold a sale or delivery to the railroad company of the bonds until the conditions specified in the petition shall have been performed, or an agreement shall have been made which is compatible with the terms of the condition. It is evident that the legislature did not intend by the act of 1871 to take away the power of the commissioners, in case of a conditional petition, to make the agreement, because by the same act they amended the act of 1870, without making any change of the language whereby the power to make the agreement was conferred.

The authority to deliver the bonds being dependent upon the subscription for the stock, a power to make an agreement to deliver the bonds necessarily implies a power to agree to make the subscription at the same time the bonds are delivered. What is implied in a statute is as much a part of it as what is expressed.

Nor do I perceive any difference in legal effect between a subscription to the stock of a corporation, conditional in its terms, and a present agreement to subscribe upon the performance of the same condition. In each case the contract is executory in its nature, and the party making it is not bound to take the stock unless the condition is performed.

That being so, I think the commissioners had authority either to wait until the condition had been performed before making the subscription, or to make a present agreement to subscribe upon the performance of the condition.

The only remaining questions arise upon the effect of the amendment of the constitution before referred to. A construction cannot be given to this provision which would make it operate retroactively so as to destroy or impair an-

tecedent rights and interests which had become vested. That proposition is too well settled to need discussion. I think also that the language of the amendment admits of a construction which would limit it to transactions occurring after its adoption, and exclude such previous acts as were authorized by existing laws.

Such is the most natural and honest construction, and we are inclined to think it should be applied in a case like this.

The question, however, must be decided, namely, whether the obligations assumed by or imposed upon the commissioners were subject to abrogation by legislative act or by constitutional amendment. Upon this subject it is contended, 1st. That the railroad company acquired no right to the bonds and the commissioners no right to subscribe for the stock until after the amendment of the constitution took effect; and, 2d. That the power reserved by the legislature to alter or repeal the acts incorporating the town and the railroad company, included the power to abrogate contracts made between them.

The answer to the first ground has been already intimated, namely: That the statute itself created the right and imposed the duty of subscribing for the stock and of issuing the bonds upon the performance of the condition imposed by the petition of the tax-payers, and that by the agreement the assent of the town, through its agents, the commissioners, to the fulfillment of that obligation and duty, and of the railroad company to the performance to the condition, were manifested.

A perfect contract was thus formed on the part of the town to deliver the bonds in payment for the stock on performance of the condition, and on the part of the railroad company to receive such subscription on those terms, and issue the stock to the town. Unless, therefore, the amendment of the constitution referred to was an exercise of the power reserved to alter and repeal charters, the inviolability, of that contract is secured by the provision of the Constitution of the United States, that "no State shall pass any law impairing the obligation of contracts." (Art. 1, sec. 10.)

No doubt the power reserved may be exercised by the people, notwithstanding it has been reserved to the legislature. (Re Oliver Lee's B'k, 21 N. Y., 9.)

That the amendment was not an exercise of that power, however, I think is clear.

The contract formed no part of the charter of either the town or the railroad company. It was outside of, and collateral to both. The charters are contracts with the State, and the reserved power alluded to is limited to those contracts, and does not embrace contracts authorized by laws in force at the time of the making thereof, made by corporations with each other or with third persons.

A repeal of a charter would not discharge debts or obligations due to the corporation. They would form part of the assets of the defunct body, and would be administered for the benefit of the creditors (if any) and stockholders of the corporation at the time of its dissolution.

How then can such repeal discharge debts or obligations due from the corporation?

A dissolved corporation, it is true, cannot be sued for the same reason that a dead man cannot, but its debts and obligations are not extinguished. Payment thereof will be enforced out of its assets, or by means of the personal liability of its members, or officers, if the charter created such liability.

An announcement of the doctrine that the repeal of the charter of a bank at once annuls its obligation to other banks, would create no little alarm as well as surprise. I am satisfied that such an interpretation of the language of the reserved power under consideration would not be correct. While the State may alter or resume its own grant of corporate powers and franchises, it cannot impair the obligation of a contract between the corporation and a third party, whether the latter be an individual or a corporation. (Fletcher vs. Peck, 6 Cranch, 133; Green vs. Biddle, 8 Wheat., 1; Aspinwall et al. vs. Com'rs of Davies, 22 How., 364; Cooley Const. Lim., 290.) In the case in 22d How. it was made the duty of county commissioners by statute to subscribe for the stock of a railroad company, if the majority of the qualified voters at an election determined in favor of the subscription.

The election took place in March, 1849. In November, 1851, a new State constitution took effect, containing the prohibition that "no county shall subscribe for stock in any incorporated company, unless the same be paid for at the

time of such subscription." The commissioners made the subscription and issued bonds for it after the last-mentioned date.

It was insisted that the subscription became complete when at the election a majority of the votes was cast in its favor, and did not require the form of a subscription on the books of the company.

The Supreme Court of the United States held otherwise, but also held that if there had been a subscription obligatory upon the parties, the contract thus created would have been protected by the Constitution of the United States, as it would then have been complete before the constitutional prohibition. In this case the power remained wholly unexercised until after the new constitution took effect, and for their failure to perform the duty enjoined upon them the commissioners might be personally liable, although no liability attached to the county. In the case before us there was an authorized agreement to execute the power. I think that fact makes a well defined and just distinction between the two cases.

It has been said that the amendment of the constitution operated as a revocation of the authority vested in the commissioners. But that merely begs the question. While it is true, as a general proposition, that a derivative authority does not survive the original authority, yet that principle could not be applied in a case like this without producing manifest injustice.

Here the railroad company have made large expenditures in constructing their road, in reliance upon the powers of the commissioners under a valid agreement made with them while such powers were in full force.

They thus acquired an interest in the execution of the power, which a revocation of it would not divest. The power became one coupled with an interest, which is not revocable at the will of the grantor. (Bell Com., 488, 490, 5 ed.; Story Ag., § 477; Hunt vs. Rousmanier, adm., 8 Wheat., 174.)

In the last case cited, Ch. J. Marshall remarked: "We know that a power to sell for the benefit of B, engrafted on an estate conveyed to A, may be exercised at any time, and is not affected by the death of the person who created it. It is then a power coupled with an interest, although the

person to whom it is given has no interest in its exercise." (See also Franklin vs. Osgood, 14 J. R., 553; Jackson ex dure Hunt vs. Ferris, 15 id., 346.)

I am of the opinion, for the reasons stated, that in this case the agreement to subscribe was, in judgment of law, equivalent to an actual subscription, and that thereby the contract which the commissioners were authorized to make became complete before the amendment of the constitution took effect.

My conclusion, therefore, is that the railroad company is entitled to a delivery of the bonds on tendering the stock, notwithstanding the condition on which such right accrued was not performed until after the constitutional amendment took effect, and that it is the duty of the defendant Newland to deliver the bonds to the railroad company upon the receipt of the certificates for an equal amount of stock. No further subscription to the stock is necessary, and I am of opinion that as the formal act of subscribing on the book of the company may possibly be now prohibited, it is not the duty of the commissioners to make any further subscription.

NINETY-SECOND SESSION.

CHAP. 907.

AN ACT to amend an act entitled "An act to authorize the formation of railroad corporations and to regulate the same," passed April second, eighteen hundred and fifty, so as to permit municipal corporations to aid in the construction of railroads.

Passed May 18, 1869; three-fifths being present.

The People of the State of New York, represented in Senate and Assembly do enact as follows:

Petition of county judge, for right to issue municipal bonds for railroad stock.

SECTION 1. Whenever a majority of the tax-payers of any municipal corporation in this State, whose names appear upon the last preceding tax list or assessment roll of said corporation as owning or representing a majority of the taxable property in the corporate limits of such corporation, shall make application to the county judge of the county in which such corporation is situated, by petition verified by one of the petitioners setting forth that they are such a majority of tax-payers and represent such a majority of taxable property, and that they desire that such municipal corporation shall create and issue its bonds to an amount named in such* petition (but not to exceed twenty per cent. of the whole amount of taxable property as shown by said tax list and assessment roll,) and invest the same or the proceeds thereof in the stock or bonds (as said petition may direct) of such railroad company in this State as may be named in said petition, it shall be the duty of said county judge to order that a notice shall be forthwith published in some newspaper in such county, or if there be no newspaper published in said county, then in some newspaper printed in an adjoining county, directed to whom it may concern, setting forth that, on a day therein named,

Petition, how verified.

2304. Limit of consent to bonding.

Notice of taking proof as to taxable property, etc.

which shall not be less than ten days nor more than thirty days from the date of such publication, he will proceed to take proof of the facts set forth in said petition as to the number of tax-payers joining in such petition, and as to the amount of taxable property represented by them. And any solvent moneyed, manufacturing or other corporation or company formed under the laws of this State, and being assessed on real or personal property therein, shall have all the rights and privileges under this act, so far as property representation is concerned, as other tax-payers. And the board of directors or trustees of any such corporation or company may apply to the county judge by petition in the same manner as herein provided for other tax-payers. The words "municipal corporation" when used in this act shall be construed to mean any city, town, or incorporated village in this State. But nothing herein contained shall be construed as to include the city or counties of New York, Kings, Erie, Greene, Albany, Westchester, Ontario, Seneca, Yates, Onondaga and Niagara.

Definition of term "municipal corporation."

Act not to apply to certain counties.

§ 2. It shall be the duty of the said judge at the time and place named in the notice to proceed to take proof as to the said allegations in said petition; and if it shall appear satisfactorily to him that the said petitioners, or the said petitioners and such other tax-payers of said town as may then and there appear before him and express a desire to join as petitioners in said petition, do represent a majority of the tax payers of said municipal corporation as shown by the last preceding tax-list or assessment roll, and do represent a majority of the *taxable property upon said list or roll, he shall so adjudge and determine and cause the same to be entered of record. And such judgment and the record thereof shall have the same force and effect as other judgments and records in courts of records in this State.

County judge, to determine whether majority of tax-payers and taxable property desire bonding.

2305.

§ 3. If the judge shall adjudge and determine that such petitioners do represent a majority of such tax-payers as aforesaid, and a majority of such taxable property, as aforesaid, it shall be his duty forthwith to appoint and commission three persons who

Appointment of railroad commissioners.

shall be freeholders, residents and tax-payers within the corporate limits of such corporation to be commissioners for the purposes hereinafter named. The Terms of office. said commissioners shall hold their offices for five years and until others are appointed by the county judge of said county, and shall, before entering Oaths of Office. upon the duties of their office, each make oath faithfully to discharge all the duties thereof. All vacancies, how filled. Compensation. cies in such commission shall also be filled by said county judge as they occur. Said commissioners shall each receive the sum of three dollars per day for each day actually engaged in the discharge of their duties, and their necessary disbursement to be audited and paid by the usual disbursing officer of Business quorum. such municipal corporation. A majority of such commissioners, at a meeting of which all have notice, shall constitute a quorum and may exercise the powers of the commission.

Issue of bonds. § 4. It shall be the duty of such commissioner, How executed. with all reasonable dispatch, to cause to be made and executed the bonds of such municipal corporation, attested by the seal of such corporation affixed thereto, if such corporation has a common seal, and if not, then by their individual seals, and signed and certified by said commissioners, who are hereby authorized and empowered to affix such common seal thereto and to so sign and certify such bonds. Rate of interest, and when payable. Such bonds shall become due and payable at the expiration of thirty years from their date, and shall bear interest at the rate of seven per cent. per annum, payable semi-annually, and shall not exceed in amount twenty per cent. of the entire taxable property within the bounds of said municipal *corporations shown by said tax list, nor shall they exceed in amount the amount set forth in such petition. The said bonds shall also bear interest warrants corresponding in number and amounts with the several payments of interest to become due thereon, but the commissioners may agree with any holders to register any such bonds, in which case the interest warrants on the registered bonds shall be surrendered, and the interest shall be payable only on the production of the registered bond, which shall then be

2306. To what amount bonds may be issued.

transferable only on the commissioner's records. The savings banks of this State are authorized to invest in said bonds, not to exceed ten per cent. of their deposits. All taxes except school and road taxes, collected for the next thirty years, or so much thereof as may be necessary, in any town, village or city, on the assessed valuation of any railroad in said town, village or city, for which said town, village or city has issued or shall issue bonds to aid in the construction of said railroad, shall be paid over to the treasurer of the county in which said town, village or city lies, and said money so paid over, including interest collected on bonds held by said treasurer as a sinking fund, shall be invested by said treasurer in State, city, town, county or village bonds, issued pursuant to law of this State, or United States bonds, within sixty days after receiving the same, and shall be held by said county treasurer as a sinking fund for the redemption and payment of the bonds issued or to be issued by said town, village or city, to aid in the construction of said railroad.

Investment in bonds by savings banks. Sinking fund for redemption of bonds, how invested.

§ 5. Such commissioners are further empowered and directed to subscribe in the name of the municipal corporation which they represent to the stock or bonds of the railroad company named in such petition, (as the petition may direct,) to an amount equal to the amount of bonds so created by them, and to pay for the same by exchanging the said bonds therefor at par; or they may, at their discretion, sell and dispose of the said municipal corporation bonds so created by them at rates not less than par, and invest the proceeds thereof in such stock or bonds of such railroad company as may be directed in said petition. They shall represent, *either in person or by proxy, such municipal corporation at all meetings of such railroad bondholders or stockholders. Such stock or bonds, so purchased by said commissioners, may be sold by them before the maturing of the bonds of such municipal corporation only upon the order of the county judge of the county, made upon the petition of a majority of the tax-payers of said municipal

Commissioners to subscribe to railroad stock.

To exchange or sell bonds, therefor, at par.

2307.

Commissioners to act at meetings of stockholders.

County judge, when authorized to direct sale of stock.

corporation representing a majority of the taxable property thereof, as shown by the last preceding tax list or assessment roll; and the proceeds from such sale shall be forthwith paid by them to the treasurer (or other proper officer) of such municipal corporation, to be by him invested in a sinking fund, as hereinafter provided. Such commissioners may vote for directors on the stock of such town, village or city.

NINETY-THIRD SESSION.

CHAP. 507.

AN ACT to define the powers of commissioners appointed under chapter nine hundred and seven of the laws of eighteen hundred and sixty-nine, bonding municipalities to aid in the construction of railroads.

Passed April 28, 1870; three-fifths being present.

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

SECTION 1. It shall be competent for any corporation, in aid to the construction of whose railroad bonds shall have been authorized to be issued by any municipal corporation in this State, to enter into any agreement with the commissioners appointed to issue said bonds, limiting and defining the times when, and the proportions in which, said bonds or their proceeds shall be delivered to said corporation, and the place or places where, and the purposes for which, such bonds or their proceeds shall be applied or used, and any such agreement in writing, duly executed by such corporation, and a majority of such commissioners, shall in all courts and places be valid and *effectual. And such commissioners shall not be compelled by any court to deliver such bonds or their proceeds to such corporation, until such agreement shall be executed, if required by them.

1149.

§ 2. This act shall take effect immediately.

NINETY-FOURTH SESSION.

CHAP. 925.

AN ACT to amend chapter nine hundred and seven of the laws of eighteen hundred and sixty-nine, entitled "An Act to amend an act, entitled 'An act to authorize the formation of railroad corporations and to regulate the same;'" passed April second, eighteen hundred and fifty, so as to permit municipal corporations to aid in the construction of railroads, and, also, to amend chapter five hundred and seven of the laws of eighteen hundred and seventy, entitled "An act to define the powers of commissioners appointed under chapter nine hundred and seven of laws of eighteen hundred and sixty-nine, bonding municipalities to aid in the construction of railroads."

Passed May 12, 1871; three-fifths being present.

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

SECTION 1. Section first of chapter nine hundred and seven of the laws of eighteen hundred and sixty-nine, is hereby amended so as to read as follows:

Tax-payers may make application to county judge.

§ 1. Whenever a majority of the tax-payers of any municipal corporation in this State who are taxed or assessed for property, not including those taxed for dogs or highway tax only, upon the last preceding assessment roll or tax list of said corporation, and who are assessed or taxed, or represent a majority of the taxable property, upon said last assessment roll or tax list, shall make application to the county judge of the county in which such municipal corporation is situate, by petition, verified by one of the petitioners, setting forth that they are such majority of tax-payers, and are taxed or assessed for or represent such a majority of taxable property, and that they desire that such municipal corporation shall create and issue its bonds to an amount named in such petition, and invest the same, or *the proceeds thereof, in stock or bonds (as said petitition may direct) of such railroad company in this State as may be named in said petition, it shall be the duty of said

That town issue bonds, and invest same in railroad companies. 2116.

Judge to order notice of taking proof of facts.

county judge to order that a notice shall be forthwith published in some newspaper in such county, or, if there be no newspaper published in said county, then in some newspaper printed in an adjoining county, directed to whom it may concern, setting forth that on a day therein named, which shall not be less than ten days nor more than thirty days from the date of such publication, he will proceed to take proof of the facts set forth in said petition as to the number of tax-payers joining in such petition, and as to the amount of taxable property represented by them. Any solvent corporation or company assessed or taxed on said last assessment roll or tax list may join in such petition, and shall have all the rights and privileges under this act as other tax-payers.

Solvent corporations may join in such petition.

Any person, partnership, or firm entitled to represent property, and enjoy rights, &c.

Any person, partnership or corporation upon whom it shall have been intended to levy a tax by virtue of said last assessment list or tax roll, under whatever name, and who shall have paid or are liable to pay such tax thus intended to be assessed and levied, shall be a tax-payer, entitled to represent the property thus taxed, and as such entitled to all the rights and privileges of this act. The petition authorized by this section may be absolute or conditional; and if the same be conditioned the acceptance of a subscription founded on such petition shall bind the railroad company accepting the same to the observance of the condition or conditions specified in such petition; *Provided*, *however*, that non-compliance with any condition inserted in such petition shall not in any manner invalidate the bonds created and issued in pursuance of such petition. No municipal corporation shall issue its bonds under the provisions of this act for a greater amount than twenty per centum of the taxable property thereof as appears on its said last assessment list or tax roll. The words "municipal corporation," when used in this act shall be construed to mean any city, town, or unincorporated village in this State, and the word "tax-payer" shall mean any corporation or person assessed or taxed for property, either individually or as agent, trustee, guardian, *executor or administrator, or who shall have been intended to have been thus taxed, and

Petitions may be absolute or conditional, and shall be binding on company accepting it.

Rate of per cent. at which bonds may be issued.

Construction of the words "municipal corporation," "tax-payer," &c.

shall have paid or are liable to pay the tax as hereinbefore provided, or the owner of any non-resident lands, taxed as such, not including those taxed for dogs or highway tax only; and the words "tax list or assessment roll" when used in this act shall mean the tax list or assessment roll of said municipal corporation last completed before the first presentation of such petition to the judge. But nothing herein contained shall be construed so as to include the city of New York or the counties of New York, Kings, Erie, Westchester, Onondaga, and the town of Royalton, in the county of Niagara, within the provisions of this act.

City and county excluded from provisions of act.

§ 2. Section two of chapter nine hundred and seven of the laws of eighteen hundred and sixty-nine is hereby amended, so as to read as follows:

Judge take proof.

§ 2. It shall be the duty of the said judge at the time and place named in the said notice to proceed and take proof as to the said allegations in said petition, and if it shall appear satisfactorily to him that the said petitioners, or the said petitioners and such other tax-payers of said municipal corporation as may then and there appear before him and express a desire to join as petitioners in said petition, do represent a majority of the tax-payers of said municipal corporation as shown by the last preceding tax-list or assessment roll, and do represent a majority of the taxable property upon said list or roll, he shall so adjudge and determine, and cause the same to be entered of record in the office of the clerk of the county in which said municipal corporation is situated, and such judgment and the record thereof shall have the same force and effect as other judgments and records in courts of record in this State; and in case any county judge, to whom any such petitions may have been presented, shall be declared incompetent or ineligible, or in any manner disqualified to hear the same, by any court on certiorari from any determination of such county judge in any proceeding under this act had before him, the original petitions, filed with the county clerk in such proceeding and on such determination, may be taken from file and *presented to a judge of an adjoining

May adjudge and cause same to be entered in county clerk's office.

Proceedings in case of incompetency of judge to act.

2118.

county or a justice of the supreme court; and in all such cases the same proceedings may be had before such county judge or justice of the supreme court as are required by the provision of this act. The judge shall file the petition as part of the judgment roll, and on making his final determination in any case, he shall forthwith publish notice thereof for three weeks, at least once in each week, in the same newspaper in which notice of such hearing was published as ordered.

Filing of judgment roll, and notice of final determination.

§ 3. Section ten of chapter nine hundred and seven, of the laws of eighteen hundred and sixty-nine is hereby amended so as to read as follows:

General provisions.

§ 10. Nothing herein contained shall be construed as permitting any municipal corporation, in or through which a railroad has already been constructed and is in operation, to aid in the construction of any other railroad under the provisions of this act, unless the railroad already built is assessed or taxed upon the assessment roll specified in this act; provided, however, that this section shall not apply to any railroad exempted from taxation by any law of this State.

How act may apply.

Review of proceedings to be by certiorari.

§ 4. Review of proceedings under the acts hereby amended shall be by certiorari, and no writ of certiorari shall be allowed unless said writ shall be allowed within sixty days after the last publication of notice of the judges' final determination, as provided in section two of this act, and where such judgment is so entered prior to the passage of this act, unless said writ is allowed within sixty days after the passage of this act. On the return of the certiorari, the court out of which the same issued shall proceed to consider the matter brought up thereby, and shall review all questions of law and of fact determined for or against either party by the county judge. And the said courts or court of appeals in appeals now pending, and in all future proceedings, may reverse or affirm or modify, in all questions of law or fact, his final determination, or may remand the whole matter back to said county judge to be again heard and determined by him. And it may by order direct that he proceed thereon *de novo*, in the same manner and with the same effect as if he

When writ may be allowed.

Proceedings on return of writ.

Court of appeals may reverse or affirm or remand back to county judge.

May direct to proceed *de novo* thereon.

had *taken no action therein, or it may by such order specify how and in what particulars he shall hear and determine the same on such remanding thereof. Applications for certiorari shall be on notice. On review, persons taxed for dogs or highway tax only shall not be counted as tax-payers unless that claim was made before the county judge. The county judge shall forthwith proceed to carry into effect all orders of any court on review under this act. 2119.

County judge to carry into effect all orders.

§ 5. Chapter five hundred and seven of the laws of one thousand eight hundred and seventy is hereby amended by adding to the end of section first as follows: But in case such commissioners and such railroad corporation cannot agree, or in case the said commissioners refuse to make any agreement, then in either case the Supreme Court at general term may, on motion, and after hearing all parties interested, determine upon what terms and conditions said bonds shall be delivered to said railroad corporations, having due regard to the public good, the rights of said municipal corporation whose bonds are authorized to be issued, and the rights of said railroad corporation, and shall have power to compel the delivery of said bonds on such terms and conditions, and in such manner as it shall thus determine upon, by the usual process of the court. Said court shall, also, by the usual process of said court in like cases, have power at any time to prevent by injunction the issue of said bonds or any portion thereof, on notice and for good cause shown. And any justice of said court may grant a temporary injunction until such motion can be heard.

On disagreement of commissioners, Supreme Court to determine conditions for delivering bonds.

Court may by injunction prevent issuing bonds.

Injunction.

§ 6. Section four of chapter nine hundred and seven of laws of eighteen hundred and sixty-nine, as amended by chapter two hundred and eighty-three of the laws of eighteen hundred and seventy-one, is hereby amended by adding at the end thereof, as follows: In case of a vacancy in the office of commissioners, or in case all commissioners are notified of any meeting, a majority of the commissioners shall have, and exercise all, the powers and duties of the three commissioners. The said commissioners

Vacancies.

Majority of commissioners may exercise powers.

Bonds, when payable.

2120.

may issue the said bonds, payable at any time they may elect, less than thirty years, any law hereto*-fore passed to the contrary, but they shall not so issue said bonds that more than ten per cent. of the principal of the whole amount of bonds issued shall become due or payable in any one year.

§ 7. This act shall take effect immediately.

Constitution of the State of New York in force January 1st, 1877.

ARTICLE VII.

*SECTION 11. No county, city, town or village shall hereafter give any money or property, or loan its money or credit, to or in aid of any individual, association or corporation, or become, directly or indirectly, the owner of stock in or bonds of any association or corporation, nor shall any such county, city, town or village be allowed to incur any indebtedness, except for county, city, town or village purposes. This section shall not prevent such county, city, town or village from making such provision for the aid or support of its poor, as may be authorized by law.

*Sections 10 and 11 added by vote of the people, November 3, 1874.

Articles of Association of the Buffalo and Jamestown Railroad Company.

ARTICLE 1. Know all men by these presents that the undersigned have associated together for the purpose of constructing, maintaining, and operating a railroad for public use in the conveyance of persons and property under and in pursuance of the provisions of an act of the people of the State of New York, represented in Senate and Assembly, entitled "An act to authorize the formation of railroad corporations and to regulate the same," passed on the second day of April, one thousand eight hundred and fifty, and acts supplementary thereto and amendatory thereof; and for that purpose we do hereby associate ourselves together under the name, style and description of the "Buffalo & Jamestown Railroad Company," which shall be the name of said company, and which said company is to continue one hundred years from this fourth day of March, one thousand eight hundred and seventy-two.

ARTICLE 2. The said railroad is to be constructed, maintained, and operated from a point within the city of Buffalo, in the county of Erie, to a point on the State line between the States of New York and Pennsylvania, on the southerly boundary of the county of Chautauqua, the length of which railroad will be seventy miles, as near as may be; and it is intended to be made through the counties of Erie, Cattaraugus and Chautauqua.

ARTICLE 3. The amount of the capital stock of the said company shall be two million dollars, and shall consist of twenty thousand shares, of one hundred dollars each.

ARTICLE 4. The names of thirteen directors, and their

respective places of residence, who are to manage the affairs of the company for the first year, and until others are chosen, are as follows: Joseph N. Tifft, Abraham Altman, Pascal P. Pratt, James S. Lyon, Julius Fuchs, Daniel C. Beard, John Auchinvole, Jewett M. Richmond, Joseph Churchyard, Absalom Nelson, Rodney W. Daniels, and James Adams, each and every one of whom resides in the city of Buffalo, in the county of Erie, and State of New York; and Cyrus D. Angel, who resides at Forestville, in the county of Chautauqua, in the State of New York.